Ling Sing Hung & Ors v Kontiki Trading Pte Ltd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO Q-02-656 AND 657 OF 1996
GOPAL SRI RAM, SITI NORMA YAAKOB AND DENIS ONG JJCA
31 MARCH 1998

Contract *— Indemnity — Distinction between guarantee and indemnity — Construction of documents — Whether documents were guarantees or indemnities — Whether s 86 of Contracts Act 1950 applicable — Contracts Act 1950 ss 77 & 79*

The first, second and third appellants were directors of a company called Protama Sdn Bhd ('the company'). The appellants were sued by the respondent on two documents that were described as letters of indemnity. In the court below, the trial judge had found in favour of the respondent. Therefore, the first appellant brought the first appeal and the second and third appellants brought the second appeal.

The main argument raised by the first appellant was that the respondent had not proved the losses claimed by it under the letters of indemnity pleaded in the statement of claim and that the trial judge ought to have so held. The only point pursued by the second and third appellants was that the contract between the respondent and the company had been varied without their consent in consequence of which the second and third appellants were discharged from their obligation under the letters of indemnity. They based their argument on s 86 of the Contracts Act 1950 ('the Act'). It was not contended either at the trial or this appeal that the documents upon which the second and third appellants were sued were not true indemnities but were really guarantees.

Held, dismissing both appeals:

(1) There was sufficient evidence led by the respondent to prove its losses. This included a letter from the first appellant to the respondent acknowledging the sums claimed by the latter against the company. The first appellant's attempt to explain this document as a false representation made by the respondent was rightly rejected by the trial judge. The first appellant's appeal should therefore be dismissed (see p 84C–D).

(2) When considering s 86, the defining provisions in ss 77 and 79 of the Act must also be considered. Section 86 of the Act governs only guarantees and does not apply to contracts of indemnity. It is for the court to construe the document and determine its true nature and character. In the present case, the two documents were intended to be indemnities and not mere guarantees. Therefore, s 86 of the Act had no application. The trial judge was correct in holding the second and third appellants liable on the two letters of indemnity (see pp 84F–I and 85B, E–F).

A **[Bahasa Malaysia summary**

Perayu pertama, kedua dan ketiga adalah pengarah-pengarah sebuah syarikat yang digelar Protama Sdn Bhd ('syarikat tersebut'). Perayu-perayu didakwa oleh penentang atas dua dokumen yang disifatkan sebagai surat tanggung rugi. Di mahkamah bawah, hakim perbicaraan
B telah didapati memihak kepada penentang. Maka, perayu pertama membawa rayuan pertama dan perayu kedua dan ketiga membawa rayuan kedua.

Hujah utama yang dibangkitkan oleh perayu pertama adalah bahawa penentang tidak membuktikan kerugian yang dituntutnya di bawah surat tanggung rugi yang diplidkan dalam pernyataan tuntutan
C dan bahawa hakim perbicaraan sepatutnya memutuskan demikian. Satu-satunya hujah yang diujar oleh perayu kedua dan ketiga adalah bahawa kontrak di antara penentang dan syarikat tersebut telah diubah tanpa kebenaran mereka yang mana akibatnya adalah perayu kedua dan ketiga telah dilepaskan daripada kewajipan mereka di
D bawah surat tanggung rugi. Mereka mendasarkan hujah mereka pada s 86 Akta Kontrak 1950 ('Akta tersebut'). Ia tidak dihujahkan sama ada di perbicaraan atau rayuan ini bahawa dokumen-dokumen atas mana perayu kedua dan ketiga didakwa bukanlah tanggung rugi sebenar dan sebenarnya merupakan gerenti.

E **Diputuskan**, menolak kedua-dua rayuan:

(1) Terdapat keterangan yang mencukupi yang dikemukakan oleh penentang untuk membuktikan kerugiannya. Ini termasuk surat dari perayu pertama kepada penentang yang mengakui jumlah-jumlah yang dituntut oleh penentang terhadap syarikat itu.
F Percubaan perayu pertama untuk menjelaskan dokumen ini sebagai satu representasi palsu yang dibuat oleh penentang telah ditolak dengan betul oleh hakim perbicaraan. Rayuan perayu pertama dengan itu haruslah ditolak (lihat ms 84C–D).

(2) Semasa mempertimbangkan s 86, peruntukan tafsiran dalam
G ss 77 dan 79 Akta tersebut mestilah juga diambil kira. Seksyen 86 Akta tersebut menguasai gerenti sahaja dan tidak terpakai kepada kontrak tanggung rugi. Mahkamah hendaklah mentafsir dokumen dan menentukan sifat dan cirinya yang sebenar. Dalam kes ini, dua dokumen itu bertujuan menjadi tanggung rugi dan bukan
H gerenti sahaja. Maka, s 86 Akta tersebut tidak terpakai. Hakim perbicaraan adalah betul dalam memutuskan perayu kedua dan ketiga bertanggungjawab atas dua surat tanggung rugi itu (lihat ms 84F–I dan 85B, E–F).]

I **Notes**

For a case on the distinction between guarantee and indemnity, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2494.

Cases referred to

Ashmore v Corp of Lloyd's [1992] 2 All ER 486 (refd)
Lakeman v Mountstephen (1874) LR 7 HL 17 (refd)
South East Asia Insurance Bhd v Nasir Ibrahim [1992] 2 MLJ 355 (refd)

Legislation referred to

Contracts Act 1950 ss 77, 79, 86

Appeal from: Suit No 16 of 1990 (High Court, Sibu)

KK Hii (*Hii & Hii*) for the appellant in Civil Appeal No 656–96.
YY Sim (*Tang & Partners*) for the appellants in Civil Appeal No 657–96.
Wong Ho Leng (*Wong Ho Leng & Co*) for the respondent in both appeals.

Gopal Sri Ram JCA (delivering judgment of the court): There are two appeals. The first, Civil Appeal No 656–96, is brought by Ling Sing Hung. He was the second defendant in the court below. He is now a bankrupt. He brought his appeal with the consent of the Official Assignee. We will refer to him as 'the first appellant'.

The second appeal, Civil Appeal No 657–96, is brought by Pau Ngie Siong and Hii Yii Pan. They were the third and fourth defendants in the court below. We will refer to them in this judgment as 'the second and third appellants'.

All three appellants were, at all material times, directors of a company called Protama Sdn Bhd ('the company'). The first appellant was also the company's managing director. The company was named as the first defendant in the writ. It has not appealed.

The appellants were sued by the respondent (the plaintiff in the court below) on two documents that were described as letters of indemnity. The substance of the respondent's case appears in paras (4)–(11) of the statement of claim which read as follows:

> (4) By a contract of agency dated 4 August 1988, the first defendant requested the plaintiff and the plaintiff agreed to act as the first defendant's agent to enter into a series of contracts for the sale of the first defendant's cargoes with its end buyer. The plaintiff shall refer to the contract of agency for its full terms and effect at the trial.
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> (5) In consideration of the plaintiff entering into the said contract of agency with the first defendant, the second defendant on 4 August 1988 and the third defendant on 6 September 1988 by a letter of indemnity ('the first indemnity') agreed, and irrevocably and unconditionally undertook inter alia:
>
> (i) at all times indemnify the plaintiff and hold the plaintiff harmless, fully and completely, from and against any claims, counterclaims, demands, actions, proceedings, damages, costs, expenses, losses and all other liabilities whatsoever including legal costs (on the basis between solicitors and own clients) which the plaintiff may suffer, incur or sustain by reason of, arising from or in connection with the letter of credit transactions; and

(ii) to pay to the plaintiff immediately on demand any money payable by the second and third defendants under the first indemnity.

(6) By a letter of indemnity made at various times in April 1989 ('the second indemnity'), the second, third, fourth and fifth defendants had, in consideration of the plaintiff entering into the contract of sale and purchase with the first defendant jointly and severally and irrevocably and unconditionally guaranteed the due performance by the first defendant of all the terms of the contract and undertook to, inter alia:

(i) at all times indemnify the plaintiff and hold that plaintiff harmless, fully and completely, from and against any claims counterclaims, demands, actions, proceedings, damages, costs, expenses, losses and all other liabilities whatsoever including legal costs (on the basis between solicitors and own clients) which the plaintiff may suffer, incur or sustain by reason of, arising from or in connection with the letter of credit transactions, and

(ii) to pay to the plaintiff immediately on demand any money payable by the second, third, fourth and fifth defendants under the second indemnity.

(7) The plaintiff shall refer to the said first and second Indemnities for their full terms and effects at the trial.

(8) The first defendant, on 7 July 1989, acknowledged in writing that it owed the plaintiff a total of S$145,952.12 and US$326,724.66 in respect of the letter of credit transactions referred to in the first and seconds indemnities, details of which are described therein ('the acknowledgement of debts'). The plaintiff shall refer to the acknowledgement of debts for its full terms and effect at the trial.

(9) By letter dated 2 August 1989, the plaintiff's solicitors Messrs Mutang & Lee demanded on the plaintiff's behalf from the first defendant the payment of S$145,952.12 and US$326,724.66 but the first defendant has failed and still fails to pay the said sum to the plaintiff or its solicitors.

(10) By letter dated 2 August 1989, the plaintiff's solicitors demanded on the plaintiff's behalf that the second and third defendants indemnify the plaintiff pursuant to the terms of the first indemnity by payment of the sum of S$145,952.12 to the plaintiff but both the second and third defendants have failed and still fail to indemnify the plaintiff.

(11) By letter dated 2 August 1989, the plaintiff's solicitors demanded on the plaintiff's behalf that the second, third, fourth and fifth defendants indemnify the plaintiff pursuant to the terms of the second indemnity by payment of the sum of US$326,724.66 to the plaintiff but the second, third, fourth and fifth defendants have failed and still fail to indemnify the plaintiff.

To these points, the second and third appellants raised several alternative defences, including a rolled-up plea of misrepresentation and undue influence. All pleaded defences were pursued at the trial. Having regard to the quality of the evidence placed before him, it comes as no surprise that the learned trial judge rejected all the defences put forward by these appellants. With respect, it would appear that those having conduct of the case of the second and third appellants did not have in mind the following observation of Lord Templeman in *Ashmore v Corp of Lloyd's* [1992] 2 All ER 486 at p 493:

> It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner.

The case of the first appellant is quite hopeless. The main argument raised by his counsel in support of his appeal was that the respondent had not proved the losses claimed by it under the letters of indemnity pleaded in the statement of claim and that the learned judge ought to have so held. With respect to Mr KK Hii who argued the first appellant's appeal with much skill, we found no merit in his complaint. There was sufficient evidence led by the respondent to prove its losses. It included a letter from the first appellant to the respondent acknowledging the sums claimed by the latter against the company. The first appellant's feeble attempt to explain away this document as the product of a false representation made by the respondent was rightly rejected by the learned trial judge. After carefully considering all the arguments advanced on the first appellant's behalf, we found ourselves unable to differ from the views expressed by the learned judge. We therefore dismissed the first appellant's appeal with costs.

With that we now turn to the appeal of the second and third appellants. The only point pursued before us by their counsel was that the contract between the respondent and the company had been varied without his clients' consent in consequence of which the second and third appellants were discharged from their obligation under the letters of indemnity. This argument is based on s 86 of the Contracts Act 1950 ('the Act') which provides as follows:

> Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transaction subsequent to the variance.

We are of the view that when considering s 86, regard must be had to the defining provisions under Pt VIII of the Act. These are ss 77 and 79. Section 77 defines a contract of indemnity as: 'A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person'. Section 79 of the Act says that a contract of guarantee 'is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety', the person in respect of which default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'.

In our judgment, the contractual incident provided for by s 86 governs only guarantees because it refers to the tripartite relationship of surety, creditor and principal debtor; expressions which, by definition, subsist under a contract of guarantee. Section 86 therefore has no application whatsoever to contracts of indemnity. See *South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 2 MLJ 355.

In the present instance, it was not contended either at the trial or before us that the documents upon which the second and third appellants were sued were not true indemnities but were, upon their proper construction, really guarantees. We are of the view that in any event, an

argument to that effect would have failed because the two documents set out in the statement of claims are, upon their true construction, indemnities and not guarantees.

We accept as settled law that the true nature and character of a document is not revealed merely by the label that parties give it. It is for the court to construe the document and determine what it really is. In the present case, it is clear from the wording of the documents and the surrounding circumstances that they were intended to be something more than mere guarantees. This tells in favour of they being in truth indemnities. They are more consistent with a primary obligation on the second and third appellants to secure the respondent against loss if the transaction should turn out unremunerative, rather than a secondary obligation to make good the particular defaults of the company. There was here neither surety, creditor nor principal debtor. And, as Lord Selborne observed in the leading case of *Lakeman v Mountstephen* (1874) LR 7 HL 17 at p 24:

> There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters ex post facto, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed.

Since the letters of indemnity upon which the second and third appellants were sued are not guarantees, s 86 of the Act has no application. The variation relied upon by these appellants does not therefore have any effect upon the primary obligation undertaken by them. The trial judge was therefore entirely correct in holding the second and third appellants liable on the two letters of indemnity.

There is an added reason why the learned trial judge's finding in the respondent's favour should be upheld. It was contended by the second and third appellants that they were 'sleeping directors' and that they had not given their consent to the variation. However, there was evidence from the first appellant which went the other way. That evidence appears to have been accepted by the judge. The judge also rejected the evidence of the second and third appellants on the point. He gave cogent reasons for doing so.

Having seen and heard the witnesses, an advantage which this court plainly lacks, his assessment of where the truth lay is entitled to have great weight. And in a matter such as the present, where much depends upon the impression created by witnesses upon the mind of the judge who saw and heard them, we must be most reluctant to interfere with his findings of primary facts.

For these reasons, we came to the conclusion that these two appeals should be dismissed with costs. We so ordered. The learned judge's decision was affirmed. We also ordered that the costs of the appeals should be taxed on separate bills. The deposits lodged in court were directed to be paid out to the respondent to account of its taxed costs.

Both appeals dismissed.

Reported by David Lai